TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908

No. 178

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

FILED SEPTEMBER 28, 1908

(19,954.)

(19,254.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 603.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 1, 1904.

1 In the Court of Claims.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY Company
vs.
THE UNITED STATES. } No. 20462.

I.—*Petition and Amended Petition.*

The claimants' original petition was filed August 25, 1896.

To said petition the defendants filed their demurrer November 7, 1896.

On July 19, 1900 by leave of court the claimants filed an amended petition which is as follows:

Amended Petition.

Filed July 19, 1900.

To the honorable the chief-justice and judges of the Court of Claims:

Your petitioner, The Chicago, Milwaukee & St. Paul Railway Company, a corporation duly organized and existing under and by virtue of the laws of the State of Wisconsin, by way of amended petition respectfully represents:

I.

That the Milwaukee and Northern Railroad Company, at the dates and times hereinafter mentioned, was a corporation of said
2 State of Wisconsin, and owned and operated the line of railroad hereinafter mentioned; that prior to the fourth day of February, 1890, it owned and operated a certain line of railroad extending from the city of Milwaukee, Wisconsin, to Republic, in the State of Michigan, a distance of 255.37 miles, and that on said last mentioned date, said line of road was extended and put in operation from said Republic to Champion, Michigan, a distance of 8.89 miles, making a total mileage of 264.26 miles.

That said line of railroad from Milwaukee to Republic had, prior to said fourth day of February, 1890, been designated by the postal authorities of the United States as postal route No. 139016, and said railroad company had been authorized by the Post Office Department to carry the United States mails thereon at such compensation as was, or might be, authorized by law and the practice of said department.

II.

That on said fourth day of February, 1890, the said railroad company having extended its line of railroad as aforesaid to said Champion, railway mail service was, by order of the Postmaster-General, on that date established and extended to said Champion from and

after February 24th, 1890, which order provided, among other things, that the rate of compensation would be adjusted in a subsequent order in accordance with law. That afterwards the said postal authorities caused the mails on said route from said Milwaukee to Champion, to be weighed for thirty successive working days, commencing September 23d, 1890, pursuant to statute in such
3 case made and provided, and the practice and usage of the Post Office Department, and thereupon, and on the first day of December, 1890, the Second Assistant Postmaster-General, under section 4002 of the Revised Statutes of the United States and the several acts amendatory thereof, and the rules, practice and custom of the Post Office Department, ordered that the compensation for the transportation of mails on route No. 139016, between Milwaukee and Champion, Michigan, be fixed from September 23d, 1890, to June 30th, 1891, at the rate of $35,022.37 per annum, being $132.53 per mile for 264.26 miles; and that from February 24th to September 22d, 1890, compensation should be allowed at the rate of $1,178.19 per annum, being $132.53 per mile for 8.89 miles extension from said Republic to Champion, Michigan; and on that date notified the said Milwaukee & Northern Railroad Company of the making of said order.

The petitioner avers that the said order of February 4th, 1890, so made by the Post Office Department, was in the words and figures following, to wit:

"From February 24th, 1890, extend service from Republic to Champion, Mich., increasing distance 9.16 miles, less 27/100 mile, terminal distance at Republic, making net increase 8.89 miles, in accordance with distance circular, and with the understanding that the rate of compensation on this extension will be adjusted in a subsequent order in accordance with the law."

And the petitioner avers that on the same day, to-wit, February 4th, 1890, the department issued to the Milwaukee & North-
4 ern Railroad Company a notice of which the following is a copy:

"Railway adjustment division.

Route No. 25016, from Milwaukee, Wis., to Republic, Mich.

Post Office Department, office of the Second Assistant Postmaster-General.

WASHINGTON, D. C., *Feb'y* 4, 1890.

SIR: An order, of which the following is a copy, has this day been made by the Postmaster-General:

'From February 24, 1890, extend service from Republic to Champion, Mich., increasing distance 9.16 miles, less 27/100 mile, terminal distance at Republic, making net increase 8.89 miles, in accordance with distance circular, and with the understanding that

the rate of compensation on this extension will be adjusted in a subsequent order in accordance with the law.'

Every railroad company is required to take the mails from and deliver them into all *terminal post offices whatever*, except in cities where other provision is made by the department, and also to all intermediate post offices which are located at not more than eighty rods from the nearest station or railroad office at which such company has an *agent*, the distance to be measured by the shortest road. The length of the route will be computed and paid for from terminal office to terminal office, as at present, except in those cities where the department causes the mail to be carried between the railroad and post office, and in such it will be computed from the place where the mail is taken from and delivered to the company. Under this regulation your company will be required to receive and deliver the mails at the following-named offices, as well as at all offices hereafter established within said limits:

Champion.

The department will provide for the carriage of mails to and from other intermediate post offices only. At all other points where mail trains do not make regular stops, the speed of trains carrying the mails must be slackened to admit the exchange of mails with safety.

The department will provide for service between the station and the following named offices:

Republic.

Very respectfully, S. A. WHITFIELD,
Second Ass't Postmaster-General.

Mr. C. F. Dutton, gen. mgr. Milwaukee & Northern R. R., Milwaukee, Wis."

That subsequently, to-wit, December 1st, 1890, the Post Office Department issued to the Milwaukee & Northern Railroad Company a notice of adjustment of pay, of which the following is a copy:

"(*Notice of Adjustment of Pay.*)

Railway adjustment division.

Route No. 139,016.

From Milwaukee, Wis., to Champion, Mich.

Post Office Department, office of the Second Assistant Postmaster-General.

WASHINGTON, D. C., *Dec.* 1, 1890.

SIR: The compensation for the transportation of mails, etc., on route No. 139,016, between Milwaukee, Wis., and Champion, Mich., has been fixed from Sept. 23, 1890, to June 30, 1891, (unless other-

wise ordered) under acts of March 3, 1873, July 12, 1876, and June 17, 1878, upon returns showing the amount and character of the service for thirty successive working days, commencing Sept. 23, 1890, at the rate of $35,022.37 per annum, being $132.53 per mile for 264.26 miles.

6 From February 24 to Sept. 22, 1890, pay is allowed at the rate of $1,178.19 per annum, being $132.53 per mile for 8.89 miles extension between Republic and Champion, Mich.

This adjustment is subject to future orders and to fines and deductions.

Very respectfully, L. LOWRIE BELL,
Second Ass't Postmaster-General.

Mr. C. F. Dutton, general manager, Milwaukee & Northern R. R. Milwaukee, Wisconsin."

And subsequently, to wit, December 3d, 1890, the Post Office Department issued another notice to the Milwaukee & Northern Railroad Company of which the following is a copy:

"(*Notice of Adjustment of Pay.*)

Railway adjustment division.

Route No. 139,016.

From Milwaukee, Wis., to Champion, Mich.

Post Office Department, office of the Second Assistant Postmaster General.

WASHINGTON, D. C., *Dec'r* 3, 1890.

SIR: The compensation for the transportation of mails, etc., on route No. 139,016, between Republic and Champion, Mich., has been fixed from February 24, 1890, to June 30th, 1891, (unless otherwise ordered) under acts of March 3, 1873, July 12, 1876, and June 17, 1878, upon returns showing the amount and character of the service for thirty successive working days, commencing Sept. 23, 1890, at the rate of $1,178.19 per annum, being $132.53 per mile for 8.89 miles, extension.

7 This adjustment is subject to future orders and to fines and deductions.

Very respectfully, J. LOWRIE BELL,
Second Ass't Postmaster-General.

Mr. W. G. Collins, gen. supt. Milwaukee and Northern R. R., Milwaukee, Wis."

And the petitioner avers that, prior to the issuance of the notice of adjustment of pay, dated December 1st, 1890, as aforesaid, the mails had been weighed on the line of the Milwaukee & Northern

railroad as aforesaid, being on and along the route aforesaid from Milwaukee to Champion, such weighing having been made pursuant to an order of the department, notice of which was issued to the Milwaukee and Northern Railroad Company, dated August 27th, 1890, as follows:

"The general superintendent railway mail service has been directed to weigh the mails on your road, route No. 139,016, between Milwaukee and Champion, Michigan, for thirty successive days, commencing September 23d, 1890, for the purpose of obtaining *data* upon which to adjust the pay in accordance with the acts of Congress governing the same, from February 24, 1890, on extension from Republic to Champion."

That such order for the weighing the mails, and such weighing thereof, was under and pursuant to the acts of Congress, especially the act of March 3, 1873, and March 3, 1875, as found in section 4002, Revised Statutes, as follows:

"The Postmaster-General is authorized and directed to re-adjust the compensation hereafter to be paid for the transportation
8 of mails on railroad routes upon the conditions and at the rates hereinafter mentioned:

First. That the mails shall be conveyed with due frequency and speed; and that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for route-agents to accompany and distribute the mails.

Second. That the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars; and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working-days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster-General may direct."

That this statute aforesaid, except as modified or supplemented by the first section of the act of March 3, 1875, July 12, 1876, and the first section of the act of June 17, 1878, was in full force and effect during the years mentioned in this petition, and that all lawful acts done by the Post Office Department in relation to the business, matters and things in this petition mentioned, were done under and in pursuance of section 4002, Revised Statutes, and of the acts of Congress in modification thereof or supplemental thereto.

The petitioner avers that the mails so weighed on the route
9 aforesaid, pursuant to such order of August 7th, 1890, were from Milwaukee to Champion, they being then the terminals of the system operated by the Milwaukee & Northern Railroad Company, and such weighing showed a daily average of 2,363 pounds of mail carried over the entire route between Milwaukee and Champion, and that the average weight of mails carried over that part of the route between Republic and Champion was but 940 pounds.

III.

That immediately thereupon and in pursuance of said order, the Milwaukee and Northern Railroad Company entered upon the work of carrying the mails over said route so as aforesaid established between Milwaukee and Champion, and fully and faithfully performed the services required by said order, and the requirements of the Post Office Department, and the acts of Congress, and thereby became entitled to the full compensation allowed it by said order of December 1st, 1890, to-wit, $36,200.56.

IV.

That the United States, instead of paying said railroad company the full amount of money to which it was entitled for the services rendered as aforesaid, only paid it at the rate of compensation fixed by said order, to-wit, $132.53 per mile for 8.89 miles, being the extension from Republic to Champion only, and refused to pay it any sum beyond the sum of $86.35 per mile for the mileage between Milwaukee and Republic, leaving a balance due and unpaid of $9,101.08.

10 V.

That subsequently, and after said service had been fully performed, and the full amount fixed by said order of December 1st, 1890, had been earned, and the payment thereof had been refused, as aforesaid, the Milwaukee & Northern Railroad Company presented a claim to said Post Office Department for the payment of the balance due, to-wit, the sum of $9,101.08, for the services so as aforesaid rendered, but said department rejected said claim, and declined to allow it for the alleged reason that after the rate of compensation had been fixed for the carrying of the mails between Milwaukee and Champion, as aforesaid, an order was made on the third day of December, 1890, as aforesaid, fixing the rate of compensation between said Republic and Champion at the rate of $1,178.19 per annum, being at the rate of $132.53 per mile for 8.89 miles, from February 24th, 1890, to June 30th, 1891, the department claiming that said last named order was a correction of the order of December 1st, 1890, which fixed the rate at $132.53 per mile for the entire distance between Milwaukee and Champion. But your petitioner insists that there is no warrant for this contention, and alleges that

under the uniform practice and usage of the Post Office Department for many years, whenever postal service is established on an extension of a line of railroad, and a weighing of the mail is had on the entire route for the purpose of ascertaining the rate of compensation, such compensation is fixed for the entire route, and not on the extension alone.

The petitioner avers that such was the practice of the Post Office Department for the fiscal year beginning July 1, 1890, and ending June 30, 1891, as shown by the report of the Postmaster-General for that fiscal year.

11 The following are all of the routes shown by the report of the Postmaster-General for the fiscal year ended June 30, 1891, upon which mails were weighed on account of extension, with the exception of those upon which the pay was $42.75 per mile per annum, and which was not changed by re-adjustment:

No. of route.	Extension, miles.	Total length, miles.	Old pay per mile.	Readjusted pay per mile.
101018	6.53	41.72	$64.95	$70.97
104034	8.57	16.44	45.32	64.13
107109	17.72	24.13	47.88	179.55
110152	22.38	32.27	42.75	70.11
114040	25.00	69.48	44.46	53.01
114144	53.64	116.10	52.16	53.87
121050	65.00	175.08	42.75	64.98
121058	153.34	306.74	44.46	87.21
122019	22.60	85.62	34.88	52.67
126005	168.06	292.89	68.40	82.08
126022	11.80	44.41	44.46	70.11
126025	50.07	75.70	45.32	74.39
129033	43.73	67.42	42.75	55.58
129037	16.11	47.54	48.74	70.97
131079	3.00	8.57	42.75	43.61
131091	28.47	72.49	48.73	61.56
133013	40.21	225.77	67.54	77.81
133023	70.45	159.08	78.66	99.18
150057	45.47	176.46	66.69	82.94
150062	72.91	86.67	42.75	44.46
153005	82.21	166.15	56.43	62.42
155059	34.25	155.43	59.00	55.58
155101	38.89	71.59	53.01	54.72
165015	54.80	75.01	42.75	131.67
171024	23.80	50.72	42.75	86.36

The compensation for all was readjusted over the entire line, i
one case resulting in a decrease, as is above shown.

And the petitioner further avers that such was the practic
of the department not only in the fiscal year endin
12 June 30, 1891, but in previous and in subsequent years, an
that under such practice, when mails were to be weighed a
times other than at the quadrennial weighing, for the purpose o
ascertaining the compensation on a railroad route, the compensatio
of the entire route was increased or decreased in accordance wit
the results of said weighings, the re-adjustment of the compensatio
to date from the time such weighing commenced, and that thi
practice was carried out in the weighing of mails in 1885, when th
compensation of said route No. 139,016 was reduced from $107.7
per mile per annum, to $88.07 per mile per annum, this weighin
being made in the middle of the contract term.

And the petitioner further avers that, for many years, it has bee
the practice of the Post Office Department to order a general weigh
ing of the mails every four years, called the quadrennial weighing
and to order special weighings at other times in the interim whe
necessary to fix the compensation on the routes extended, or whe
required by special contracts.

In determining the compensation for carrying the mails on a
extension of a mail route, the practice of the department, as afor
said, has been to order a weighing of the mails on the whole lin
within a reasonable time after the date service was ordered on th
extension, adjusting the compensation on the whole line from th
date the weighing commenced, and on the extension from the dat
service was authorized, based upon the weights carried, except whe
such weighing occurs at the time of the regular quadrennial weigh
ing, when the pay over the whole line is adjusted from the first da
of the next July, and such has been the practice on and with th
Milwaukee & Northern railroad. The following are instances o
such practice.

13 1. Compensation on route 25016 (new No. 139016), Mi
waukee to Green Bay, from August 1st, 1882, to June 30th
1883, was fixed at $99.18 per mile. Under the regular quadrennia
weighing commencing April 4th, 1883, the compensation on th
extension from Green Bay to Stiles was fixed at $107.73 per mil
from August 15th, 1882,—the date the service was authorized—an
on the whole line from July 1st, 1883, at the same rate, and this ra
of compensation was paid up to April 15th, 1884.

2. Service on extension from Stiles to Lena was authorized Apr
2nd, 1883, and from Lena to Dickinson May 7th, 1883, and fro
Dickinson to Crivitz October 10th, 1883. A special weighing of th
mail on the whole line between Milwaukee and Crivitz was ordere
and had, commencing April 16th, 1884, and the compensation wa
fixed on the several extensions above named at $94.91 per mil
commencing in each case from the date the service was authorize
thereon up to April 15th, 1884, and the compensation on the who

line, between Milwaukee to Crivitz, was fixed at $94.91 per mile, from April 16th, 1884, the date the weighing commenced, and this rate of compensation was paid up to March 17th, 1885.

3. Service was authorized on an extension from Crivitz to Pike, February 9th, 1885, and a special weighing was ordered and had commencing March 18th, 1885, fixing the compensation on said extension from February 9th, 1885,—the date the service was authorized,—to March 17th, 1885, at $88.07 per mile, and on the whole line from Milwaukee to Pike at $88.07 per mile, from March 18th, 1885, the date the weighing commenced, up to June 30th, 1887.

14 4. Service was authorized on an extension from Pike to Iron Mountain, December 1st, 1886, and at the regular quadrennial weighing commencing March 30th, 1887, compensation on said extension was fixed at $88.92 per mile from December 1st, 1886,—the date the service was authorized—to June 30th, 1887, and on the whole line from Milwaukee to Iron Mountain at $88.92 per mile, from July 1st, 1887, and this rate of compensation was paid up to March 18th, 1888.

5. Service was authorized on an extension from Iron Mountain to Republic, February 27th, 1888, and a special weighing was ordered and had, commencing March 19th, 1888, under which the compensation on said extension was fixed at $86.35 per mile from February 27th, 1888,—the date the service was authorized—to March 19th, 1888, and on the whole line from Milwaukee to Republic at $86.35 per mile, from March 19th, 1888, the date the weighing commenced.

Your petitioner avers that the general practice of the department with the railroads of the country as above stated, and the practice of the department with the Milwaukee and Northern Railroad Company, as aforesaid, are in harmony with its contention and contrary to the action of the department in the particular matter out of which this action grows.

Wherefore, your petitioner claims and avers that the Milwaukee & Northern Railroad Company was justly entitled to the full amount of the compensation fixed and allowed by said order of December 1st, 1890, to-wit, $36,200.56, and that the payment of the balance due, to-wit, the sum of $9,101.08, has been and is wrongfully and unjustly withheld.

15 VI.

Your petitioner further avers that on the 30th day of September, 1890, it became the purchaser, and thereupon it became the lawful owner by assignment and transfer, of all of the capital stock of the said Milwaukee & Northern Railroad Company; that on the 1st day of October, 1890, the board of directors of the Milwaukee & Northern Railroad Company was reorganized by the election of persons who were either directors or officers of the petitioner, and the offices were filled by the election of persons who were officers of its company, with the solitary exception of the president of the Milwaukee & Northern Railroad Company; that from the 30th day of

September, 1890, until the 26th day of June, 1893, that company operated the railroad as a separate organization and in the name of the Milwaukee & Northern Railroad Company; that on the 26th day of June, 1893, pursuant to a vote of the stockholders of the Milwaukee & Northern Railroad Company, the latter company executed a deed to the petitioner, whereby it conveyed to petitioner all its railroads, railways, rights of way, depot grants, tracks, bridges, etc., and also all other property and choses in action whatsoever, both real and personal, of the said Milwaukee & Northern Railroad Company, and all its rights, privileges, and corporate franchises connected with or relating to such railroad or to the construction, maintenance, use or operation of the same. And that thereafter, to-wit, August 28, 1893, the Milwaukee & Northern Railroad Company held its last stockholders' meeting and its last directors' meeting, and since that time it has not exercised any corporate functions or powers, nor has it pretended to do anything of the sort. Your petitioner avers that by reason of the premises it has been the owner of the claim in suit ever since June 26, 1893, and is now the owner of the foregoing claim, no part thereof having been assigned or transferred by the petitioner in any way, and that it is entitled to receive payment thereof. Your petitioner further avers that it has not waived or relinquished its right to demand, sue, and recover from the United States the said amount of $9,101.08, so wrongfully withheld by the Postmaster General aforesaid.

Wherefore your petitioner prays judgment for the sum of nine thousand one hundred and one dollars and eight cents ($9,101.08).

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
By A. J. EARLING, *Its President.*

GEORGE R. PECK,
515 *Old Colony Building, Chicago, Ill.,*
DUDLEY & MICHENER,
Washington, D. C.,
Attorneys for said Petitioner.

STATE OF ILLINOIS, } ss:
County of Cook, }

A. J. Earling, being duly sworn, deposes and says that he is an officer of the above named petitioner, The Chicago, Milwaukee & St. Paul Railway Company, to-wit, its president, and that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, and that said petitioner is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and he is informed and believes that the facts stated in said petition are true.

A. J. EARLING.

Subscribed and sworn to before me this 16th day of July, A. D. 1900.

[SEAL.]

W. D. MILLARD,
Notary Public, Cook County, Illinois.

16 II.—*Demurrer to Amended Petition.*

Filed December 14, 1903.

Comes now the defendant, The United States, by its Attorney General and demurs to the amended petition, filed in the above entitled action July 19, 1900, for the following reasons:

First. Because it appears that the claim therein presented has come to the claimant, if at all, by a pretended assignment which, as to the United States, is void.

Second. Because the allegations set forth in said amended petition do not state facts sufficient to constitute a cause of action in favor of the claimant and against the United States.

L. A. PRADT,
Assistant Attorney General.

Filed December 14, 1903.

17 III.—*Argument and Submission on Demurrer.*

At a Court of Claims held January 11, 1904.

This case was argued and submitted on demurrer.

IV.—*Judgment of the Court.*

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY Company
v.
UNITED STATES. } No. 20462.

At a Court of Claims held January 18, 1904, the demurrer of the defendants to the amended petition of the claimant was sustained and it was ordered that the said amended petition of the claimant, The Chicago, Milwaukee and St. Paul Railway Company be dismissed.

BY THE COURT.

18 V.—*Application for and Allowance of Appeal.*

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY Company
v.
UNITED STATES. } No. 20462.

Comes now the petitioner and prays the court to grant an appeal to the Supreme Court of the United States from the decision and

judgment of this court in sustaining the demurrer and dismissing the petition in this case.

DUDLEY AND MICHENER,
Attorneys for the Petitioner.

Filed February 9, 1904.

Ordered that the appeal in said cause be allowed as prayed for.

BY THE COURT.

February 9, 1904.

19 In the Court of Claims.

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY Company
v.
THE UNITED STATES. } No. 20462.

I, John Randolph assistant clerk of the Court of Claims certify that the foregoing are true transcripts of pleadings in the above entitled cause,—of the judgment of the court dismissing petition on demurrer,—of the application for and allowance of appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 15th day of February, A. D. 1904.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: File No. 19,254. Court of Claims. Term No. 603. The Chicago, Milwaukee and St. Paul Railway Company, appellant, *vs.* The United States. Filed February 29", 1904. File No. 19,254.

Supreme Court of the United States

OCTOBER TERM, 1909.

No. 193.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant,

vs.

THE UNITED STATES.

Appeal from the Court of Claims.

Appellant's Brief.

GEO. E. PIERCE,
W. W. [illegible],
L. T. [illegible],
Attorneys for Appellant.

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 198.

THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Appellant,

vs.

THE UNITED STATES.

Appeal from the Court of Claims.

Appellant's Brief.

I.

The original petition was filed in the Court of Claims August 25, 1896, and the amended petition was filed July 19, 1900. (Page 1.)

To this amended petition the appellant demurred for two reasons:

First. Because the claim "has come to the claimant, if at all, by a pretended assignment which, as to the United States, is void."

Second. Because the amended petition does not state facts sufficient to constitute a cause of action. (Page 11.)

The right of the appellant to sue is pleaded at length in part VI of the amended petition. (Pages 9 and 10.) The essential portions are as follows:

"Your petitioner further avers that on the 30th day of September, 1890, it became the purchaser, and thereupon it became the lawful owner by assignment and transfer, of all of the capital stock of the said Milwaukee & Northern Railroad Company; that on the 1st day of October, 1890, the board of directors of the Milwaukee & Northern Railroad Company was reorganized by the election of persons who were either directors or officers of the petitioner, and the offices were filled by the election of persons who were officers of its company, with the solitary exception of the president of the Milwaukee & Northern Railroad Company; that from the 30th day of September, 1890, until the 26th day of June, 1893, that company operated the railroad as a separate orgeganization and in the name of the Milwaukee & Northern Railroad Company; that on the 26th day of June, 1893, pursuant to a vote of the stockholders of the Milwaukee & Northern Railroad Company, the latter company executed a deed to the petitioner, whereby it conveyed to petitioner all its railroads, railways, rights of way, depot grants, tracks, bridges, etc., and also all other property and choses in action whatsoever, both real and personal, of the said Milwaukee & Northern Railroad Company, and all its rights, privileges, and corporate franchises connected with or relating to such railroad or to the construction, maintenance, use, or operation of the same. And that thereafter, to wit, August 28, 1893, the Milwaukee & Northern Railroad Company held its last stockholders' meeting and its last directors' meet-

ing, and since that time it has not exercised any corporate functions or powers, nor has it pretended to do anything of the sort. Your petitioner avers that by reason of the premises it has been the owner of the claim in suit ever since June 26, 1893, and is now the owner of the foregoing claim, no part thereof having been assigned or transferred by the petitioner in any way, and that it is entitled to receive payment thereof."

We may summarize these averments as follows: The appellant became the owner, September 30, 1890, through purchase and assignment, of all the capital stock of the Milwaukee & Northern, and from that time until June 26, 1893, appellant operated the Milwaukee & Northern in the name of that company, at which latter date, pursuant to a vote of its stockholders, the Milwaukee & Northern conveyed to appellant all its railroads, rights of way, etc., all other property and choses in action, both real and personal, and all its rights, privileges, and corporate franchises, to the appellant. Since August 28, 1893, the Milwaukee & Northern has not exercised any corporate functions or powers.

In other words, the appellant absorbed or consolidated with the Milwaukee & Northern, a thing it had a perfect right to do under the laws of Wisconsin then and now in force.

In part I of the petition (p. 1), it is averred that the appellant's line extended from Milwaukee, Wisconsin, to Republic, Michigan, and thence was extended to Champion, Michigan. The line was in two States. This absorption or consolidation was lawful.

The company was organized under the laws of Wis-

consin. (Page 1.) Section 1830 of the laws of Wisconsin provided:

"Any railroad corporation heretofore or hereafter organized pursuant to any law of this State may exercise all its rights, franchises. and privileges in any other State or Territory in the United States, under and subject to the laws of the State or Territory where it may exercise or attempt to exercise the same, and may accept from any other State or Territory, and use any additional or other powers or privileges applicable to the carrying of persons and property by railway or steamboat in said State or Territory, or otherwise applicable to the doings of said corporation in said State or Territory."

This statute gave the appellant the right to exercise all its rights, franchises, and privileges in the State of Michigan but subject to its laws.

Turning now to section 1833 of the laws of Wisconsin, we find that any railroad corporation organized or existing under the laws of that State may consolidate its stock, franchises, and property with any other railroad corporation, whether within or without the State of Wisconsin, etc., and may become one corporation by any name selected. The section then proceeds as follows:

"Any such railroad corporation may lease or purchase, and take a conveyance or assignment of the railroad, franchises, immunities, and all other property and appurtenances, and the stock or bonds thereof, of any other railroad corporation, or any portion thereof, within or without this State, when their respective railroads can be lawfully connected and operated together to constitute one continuous main line, or when the road so purchased will constitute branches or feeders of any road maintained and operated by such purchasing corporation." * * *

This statute plainly conferred on the appellant the power to consolidate with the Milwaukee & Northern and purchase its stock, and the power to purchase and take a conveyance or assignment "of the railroad, franchises, immunities, and all other property and appurtenances, and the stock or bonds thereof." * * * Statutes of similar purport are in force in Michigan. Howell's Statutes, sec. 3343; Compiled Laws Mich. (1897), sec. 6254, 6339.

It will be observed that the conveyance or assignment under the Wisconsin statute not only covers the railroad, franchises, and immunities, but it also covers "all other property and appurtenances." This language covers the claim sued on in this case. The words "all other property" clearly include personal property, rights, claims, demands, and choses in action, as we think. If so, has there been such an assignment or transfer of the demand sued on as is forbidden by law?

Section 3477, Rev. Stat., forbids transfers or assignments of any claim upon the United States, or of any part or share thereof, or interest therein, unless made after the allowance of a claim, etc. Was the transaction by which the appellant took the conveyance and assignment of all the property and rights of the Milwaukee & Northern, such a transfer or assignment as is forbidden by section 3477? Here the corporate entity of the Milwaukee & Northern was absorbed by the appellant. The Milwaukee & Northern lost its corporate existence. The two corporations became one. All the properties, franchises, and immunities of the Milwaukee & Northern were merged into and became parts of the appellant corporation. The public functions that had been exercised and the public duties that had been performed by the Milwau-

kee & Northern have been exercised and performed by the appellant since June 26, 1893. At that time there was a complete legal union of the two companies but in the name of the appellant, and since that date the appellant has held and enjoyed all of the corporate properties, rights, privileges, franchises, and immunities of the Milwaukee & Northern. We submit that these transactions did not culminate in a result forbidden by section 3477, for everything done was expressly permitted by statute.

Section 3477 has been considered in a number of cases that seem to establish the principle for which we are contending.

This court has held that assignments for the benefit of creditors, and assignments to assignees in bankruptcy, do not fall within the prohibition of section 3477. This is so because all such assignments are made pursuant to laws expressly authorizing them. *Goodman* vs. *Niblack*, 102 U. S., 556; *Erwin* vs. *U. S.*, 97 U. S., 392; *Butler* vs. *Goreley*, 146 U. S., 303.

In the bankruptcy cases the assignments were made pursuant to the laws of the United States, but in the insolvency cases the assignments were made pursuant to the laws of the various States.

We ask particular attention to the fact that this court has more than once decided that an assignment made in compliance with the laws of a State is valid, lawful, and beyond the purview of section 3477. (See cases last cited.)

If an assignment for the benefit of creditors, made under a State law, is valid, notwithstanding the provisions of section 3477, it would seem to follow inevitably that an absorption, consolidation, merger,

or transfer, made as in part VI of the petition described, and in all respects in compliance with the laws of the States of Wisconsin and Michigan, must be held valid, lawful, and entirely beyond the provisions of that section of the Revised Statutes.

What is the effect of the Wisconsin statutes already quoted in this brief? What is the effect of that which was done between the appellant and the Milwaukee & Northern under that statute? The Wisconsin statute not only consents to, but authorizes, the consolidation of existing corporations. It is a general rule, in the absence of statutory denials or restrictions, that a consolidation of corporations has the effect of dissolving former corporations and at the same instant creating a new corporation with the properties, liabilities, and stockholders derived from the old, upon such terms and conditions as may have been prescribed by the act of consolidation. *McMahon* vs. *Morrison*, 16 Ind., 172. That case is printed with an elaborate note in 79 Am. Dec., 418, 422, and it was followed and approved by this court in *Clearwater* vs. *Meredith*, 1 Wall., 40, and *Shields* vs. *Ohio*, 95 U. S., 323.

Though the usual effect of a consolidation, as we have seen, is to dissolve the constituent companies, yet no such effect is produced as to the purchasing or absorbing company where the consolidation takes place through the absorption of one company by another under the purchase of its stock and properties. *Central R. R. Co.* vs. *Ga.*, 92 U. S., 665; 1 Beach. Priv. Corp., sec. 338; 1 Thomp. on Corp., sec. 324, 330. The existence of one company is thus merged into that of the other, in which case the latter is not dissolved. *Philadelphia & Wilmington R. R. Co.* vs. *Maryland*, 10 How., 376, 392, 393, 394; 1 Thomp. on

Corp., sec. 399, 400. This is the true rule, even if the act should refer to the merger as a "consolidation." *Central R. R. Co.* vs. *Ga.*, 92 U. S., 665.

When two or more companies unite or consolidate, and thus form a new or consolidated company, the latter, unless restricted by the laws under which the consolidation took place, succeeds to possession of the franchise, rights, privileges, and immunities of the several companies from which it is formed. 1 Beach on Private Corporations, sec. 340; 1 Thomp. Corp., sec. 365–379, 380–387, 396, 399, and cases cited, among them, *Zimmer* vs. *State*, 30 Ark., 677; *Thomlinson* vs. *Branch*, 15 Wall., 460; and *Indianapolis, etc., R. Co.* vs. *Jones*, 29 Ind., 465. This rule is adopted by statute in Wisconsin. Section 1833, above quoted.

And it is well settled that where one corporation goes entirely out of existence by being consolidated or merged into another, and no arrangements are made respecting the property and liabilities of the extinguished corporation, the one newly created will be entitled to all the property. *Thompson* vs. *Abbott*, 61 Mo., 176; *Davis* vs. *Memphis R. R. Co.*, 87 Ala., 633. These cases hold, also, that where two or more companies are consolidated, the new one may enforce the rights of the old one.

Railway consolidation often takes the form of absorption of one railway by another, as where branches are united with a trunk line, or short lines are united with longer lines so as to form one continuous line, as in the case at bar. It is well settled that in such cases, the absorbing company proceeds without change of name and succeeds to the rights possessed by the company so absorbed. 1 Thomp. on Corp., sec. 396.

It is also well established that all the choses in action of the old companies are transferred to the newly created company and may be enforced by it in its own name. *Cumberland College* vs. *Ish.*, 22 Cal., 641; *Miller* vs. *Lancaster*, 5 Coldw., 514; *University of Vermont* vs. *Baxter*, 42 Vt., 99. And be owned in its own name. *Indianola R. R. Co.* vs. *Fryer*, 56 Tex., 609; *University of Vermont* vs. *Baxter*, 42 Vt., 99; 1 Beach on Private Corporations, sec. 342.

Of special interest is the case of *Miller* vs. *Lancaster*, *supra*. The second point in the syllabus is as follows:

"After consolidation of railroad companies, the new acquire the rights of the old, and are subject to the liabilities of the old companies. Where a consolidation and merger of corporations are made, and such transfer of rights and properties, and assumption of liabilities between the old and the new companies are effected, the new company stands in the stead of the old companies, may enforce the rights of the old company, and be subject to its liabilities."

The rule that the new company takes all the liabilities of the former must be followed, *ex necessitate rei*, by a rule that the new company takes all the rights of the former. The burden of liabilities must be lightened or relieved by compensatory rights or no one would take up the burden.

Another interesting case is *University of Vermont* vs. *Baxter*, *supra*.

By the union of the University of Vermont and the Vermont Agricultural College, under the Act of the Legislature approved February 9, 1865 (Session Laws, 1865-96), out of two independent corporations, a new corporation was created in the name of the "Univer-

sity of Vermont, a State Agricultural College," and the property of the University passed to and vested in the new corporation.

The act in terms gives the right to the new corporation to maintain actions in its own name in relation to the real property vested in it by the union, but is silent as to the right to sue on choses in action, although it transfers them to the new corporation, and substitutes it for the original party without prejudice to the other party.

The court held that the act passed the right to the new corporation to sue in its own name upon such claims.

We submit that we have established the following propositions:

1. The claim of the Milwaukee & Northern was assigned to and vested in the appellant pursuant to statute. The proceedings were lawful, the lawful title to the claim sued on passed thereby to the appellant, and section 3744, Rev. Stat., does not apply.

2. The appellant has the right to sue on the claim in its own name.

Therefore the court below erred in sustaining the demurrer and in dismissing the petition.

II.

The second ground of demurrer (p. 11) is that the amended petition does not state facts sufficient to constitute a cause of action.

The first paragraph of the petition (p. 1) alleges substantially that on the dates named it owned and

operated the line of railroad in the petition described and, prior to the 4th of February, 1890, it owned and operated a railroad from Milwaukee, Wisconsin, to Republic, Michigan, a distance of 255.37 miles. The road was extended February 4, 1890, and put in operation from Republic, Michigan, to Champion, in that State, a distance of 8.89 miles, thus making a total mileage of 264.26 miles. Prior to that date, the road from Milwaukee to Republic had been designated by the postal authorities as Postal Route No. 139,016, and the company had been authorized to carry the mails thereon for a suitable compensation.

The second paragraph of the petition (pp. 1–6) alleges in substance that on the day the railway company extended its line, as above stated, to Champion, Michigan, the railway mail service was, by order of the Postmaster General, established and extended to Champion from and after February 24, 1890, and that order provided, among other things, that such extension was "with the understanding that the rate of compensation on this extension will be adjusted in a subsequent order, and in accordance with the law." The order is copied on page 2 and the notice is on pages 2 and 3 of the Record. Subsequently (see page 2), the postal authorities caused the mails on the said route from Milwaukee to Champion to be weighed for thirty successive working days, commencing September 23, 1890. The Postmaster General, December 1, 1890, ordered that the compensation for the transportation of mails on the route between Milwaukee and Champion be fixed from September 23, 1890, to June 30, 1891, at the rate of $35,022.37 per annum, being $132.53 per mile for 264.26 miles, *that being the distance from Milwaukee to Champion;* and that from February 24, the date of the order

establishing and extending the service, as above stated, to September 22, 1890, the day before the weighing of the mails was begun, compensation should be allowed at the rate of $1,178.19 per annum, being $132.53 per mile for the 8.89 miles of extension from Republic to Champion. The notice of the company will be found at the bottom of page 3 and the top of page 4 of the Record. This adjustment and the notice thereof include and treat the extension from Republic to Champion as part and parcel of postal route No. 139,016 "between Milwaukee, Wisconsin, and Champion, Michigan,"

There was a period from February 24 to September 20, 1890, which was not covered by the broad terms of the first paragraph of the order, but the second paragraph gives to the extension between Republic and Champion, from February 24 to September 22, *exactly the same pay per mile as that allowed for the whole route between Milwaukee and Champion, beginning with September* 23, 1890. Thus, a second time, and in a different way, the Department expressed its determination that the route from Milwaukee to Champion was but one route—No. 139,016—and for the whole length of the line the Government was to pay the company at the rate and on the mileage above named for *the whole number of miles between Milwaukee and Champion.* The order and notice of adjustment state that this is "upon returns showing the amount and character of the service for thirty successive working days, commencing September 23, 1890." (Pages 3, 4.)

All this was done and bears date of December 1, 1890, but two days thereafter the Department issued another notice to the company (p. 4) in which it was stated that the compensation on route No. 139,016, between Republic and Champion, "has

been fixed from February 24, 1890, to June 30, 1891, at $132.53 per mile for 8.89 miles extension."

It will be observed that this notice recognizes route No. 139,016 as covering the line between Republic and Champion, although originally it covered only that part of the line from Milwaukee to Republic. It will be observed also, that this notice ignores the fact that prior to December 1, 1890, the mails had been weighed on the whole line of the company, on and along route No. 139,016, from Milwaukee to Champion, a distance of 264.26 miles, pursuant to an order of the Department (p. 5.) directing the weighing of the mails on that route "between Milwaukee and Champion, Michigan, for thirty successive days, commencing September 23, 1890, for the purpose of obtaining data upon which to adjust the pay, in accordance with the acts of Congress governing the same, from February 24, 1890, on extension from Republic to Champion."

That order and the weighing of the mails was pursuant to section 4002, Rev. Stat., copied on page 5 of the Record. This paragraph ends with the averment (p. 6) that the mails so weighed on that route were from Milwaukee to Champion, they being then the terminals of the system operated by the company, and such weighing showed a daily average of 2,363 pounds of mail carried over the entire route between Milwaukee and Champion, and that the average weight of mails carried over that part of the route between Republic and Champion was but 940 pounds.

The third paragraph of the petition (p. 6) alleges that the company immediately, and in pursuance of the order of December 1, 1890, entered upon the work of carrying the mails over that route between Mil-

waukee and Champion, faithfully performing the services required by order of the Department and the Acts of Congress, and became entitled to the full compensation allowed it by that order, viz, $36,200.56.

The fourth paragraph of the petition (p. 6) avers that the United States, instead of paying the full amount due, paid the company at the rate of $132.53 per mile for 8.89 miles, being the extension from Republic to Champion, and refused to pay any sum beyond $86.35 per mile for the mileage on the route between Milwaukee and Republic. The small services was given the big pay.

The next paragraph (pp. 6-9) avers that after the services had been performed, the full amount fixed by the order of December 1, 1890, had been earned, and the payment thereof had been refused, the company presented a claim to the Department for the balance $9,101.08, for its services, but the Department rejected the claim and refused to pay it, asserting that the order of December 3, was a correction of the order of December 1, 1890.

The petition avers that there is no warrant for that contention, and that, under the uniform practice and usage of the Department for many years, whenever postal service is established on an extension of a line or railroad, and the weighing of the mail is had on the entire route for the purpose of ascertaining the rate of compensation, *such compensation is fixed for the entire route and not on the extension alone.* That was the practice of the Department for the fiscal year ending June 30, 1891, as shown by the report of the Postmaster General. The particulars are set forth with exactness on page 7 of the Record. *The compensation for all those routes was readjusted over the entire line.*

That was the practice not only of that fiscal year, but in previous and subsequent years (p. 8), and under such practice, when mails were weighed other than the quadrennial weighings for the purpose of ascertaining the compensation on a railroad route, the compensation of *the entire route* was increased or decreased in accordance with the results of said weighings.

In determining the compensation for carrying the mails on an extension of a mail route, the practice of the Department (pp. 8–9) has been to order a weighing of the mails on the whole line, adjusting the compensation on the whole line from the date the weighing commenced, and on the extension from the date service was authorized, based upon the weights of mail carried, and such has been the practice on the road of this company, as well as on the routes and roads named on pages 8 and 9.

The general practice of the Department with the railroads of the country, and the practice of the Department with the company, are in harmony with its contention and contrary to the acts of the Department in this particular instance.

This interpretation of the statute is the natural and sensible one. Section 4002 at the beginning authorizes the Postmaster General to readjust the compensation to be paid for the transportation of mails on *railroad routes*, not parts thereof. The second portion of the section enacts that "the pay per mile per annum shall not exceed the following rates, namely, on routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars, * * * the average weight to be ascertained, in every case, by the actual weight of the mails for

such a number of successive working days not less than thirty." * * *

The Postmaster General is authorized to readjust the compensation "on *railroad routes* upon the conditions and at the rates hereinafter mentioned." It will be noticed that he is not authorized to split up a route into fragments and to readjust upon part of a route. He is to deal with the whole route, not a part.

The second part of the statute directs that the pay shall not exceed certain rates "on routes carrying their whole length an average weight of mails per day of" * * * Here there is no splitting up of routes into parts or fragments. The Postmaster General is not authorized to fix the pay on *a part of the route*. The legislative purpose, as declared by the language used, was to deal with a route as a complete thing—a complete entity—one which should not be cut up into parts or divided.

Abundant reason can be found to support that legislative intent or purpose. Its wisdom will occur to any one who will reflect upon the results which would follow such division of railroad postal routes into parts or fragments, but whether wise or unwise the intent of the statute is perfectly plain.

We are strengthened in this view by the concluding sentence of the section in which it is enacted that the average weight is to be ascertained by the actual weighing of the mails for not less than thirty working days,—not the weighing of the mails on a part of the route, *but the weighing of the mails for the whole route, in order that the average weight may be ascertained*. Why should the mails be weighed thus if the route is to be divided into parts thereafter?

Evidently the Postmaster General or, more strictly speaking, the Second Assistant Postmaster General, understood that the statute was to be interpreted in the way we claim, because December 1, 1890, in his order of adjustment and notice, he acted on that theory or rule of interpretation. Two days afterwards he experienced a temporary change of mind and tried to undo that which he had done December 1st. We submit that the thing he did December 1, 1890, was lawful and valid, and that which he undertook to do December 3, was unlawful in this, that he tried to exercise a power, and to put an interpretation upon section 4002 which the law does not warrant. Therefore, the alleged order of December 3, 1890, was and is absolutely null and void because without warrant of law.

The interpretation of the Department for many years, as alleged and particularly set forth in the petition, is in harmony with our contention and directly opposed to the act of the Second Assistant Postmaster General in the alleged order of December 3, 1890.

For these reasons we submit that the judgment of the court below should be reversed.

Respectfully submitted.

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Supreme Court of the United States

OCTOBER TERM, 1906.

No. 195.

THE CHICAGO MILWAUKEE AND ST. PAUL RAILWAY COMPANY, Appellant,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS

REPLY BRIEF

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In the Supreme Court of the United States

OCTOBER TERM, 1904

THE CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY, *Appellant*, vs. THE UNITED STATES. } No. 198.

APPEAL FROM THE COURT OF CLAIMS

REPLY BRIEF

I.

1. In the true sense of the term, there was no assignment of the claim. The deed conveying to the petitioner all the property of the Milwaukee & Northern Railroad Co., including choses in action, etc., was but an incident of the absorption of the Milwaukee and Northern by this petitioner, or the merger or consolidation of the two companies into

one, bearing the name of the petitioner. For the details, see pages 9 and 10 of the record.

It was not a transfer of this claim by the Milwaukee & Northern Railroad Co., in either the statutory or the ordinary or the strict sense of the term. All the property of the Milwaukee & Northern, and all its rights, privileges and corporate franchises, vested in the petitioner by reason of certain transactions in harmony with the laws of Michigan and Wisconsin. The result was that the Milwaukee & Northern was dissolved, because the petitioner absorbed that company and all its properties and franchises. The petitioner thereby succeeded to the possession of the franchises, rights, privileges, immunities and properties of the Milwaukee & Northern and, therefore, this action is brought by the successor of that company, not by an assignee. By reason of the premises, the petitioner succeeded to all the rights of prosecution, just as an administrator or executor succeeds to the rights to prosecute and collect claims owned by the decedent, and just as a trustee in bankruptcy or an assignee in insolvency succeeds to such rights possessed by the insolvent.

2. Section 3,477, Rev. Stat., was enacted "to protect the Government, and not the claimant, and to prevent frauds upon the Treasury." *Price* v. *Forrest*, 173 U. S., 423, and cases cited.

In that case a receiver was appointed by a court of competent jurisdiction, and this court held, after an elaborate review of all the authorities, that the assignment made to the receiver by the order of the court was not prohibited by the statute. The assignment was but an incident of the receivership and of the collection of the claim, just as the assignment by deed in the case at bar was but an incident in the merger, or consolidation, or absorption, and in the final collection of the claim sued on. In the case at bar, the result was nothing more than the change of corporate entities. When the Milwaukee & Northern went out of ex-

istence, its properties and franchises becoming the property of this petitioner, there was no person, and no other corporation than this one, to present this claim to the Government and demand its collection by legal proceedings, because the Milwaukee & Northern had ceased to exist, its identity being merged in the identity of this petitioner. It follows that the mischief sought to be prevented by Section 3,477, i. e., harrassing the Government by multiplying the number of persons with whom it has to deal, or the danger of enlisting improper influences in advocacy of a claim, cannot exist here. See *Goodman* v. *Niblack*, 102 U. S., 556–560; *Erwin* v. *United States*, 97 U. S., 392–397; *Price* v. *Forrest*, 137 U. S., 421.

Here the merger or absorption of the Milwaukee & Northern is explicitly alleged in the petition, and it is also alleged that the petitioner is the owner of the claim, no part thereof having been assigned or transferred by it in any way. Thus the case is planted on the contract made by the Milwaukee & Northern with the United States, the merger or consolidation of that company with the petitioner, and the ownership of the claim by the latter, coupled with the denial of an assignment or transfer thereof. It is apparent, therefore, that this acquisition of the claim is not among the evils which the statute was designed to prevent, and that the action is being prosecuted by the lawful successor of the Milwaukee & Northern.

In *Erwin* v. *United States*, 97 U. S., on p. 397, this court said that "the passing of claims to heirs, devisees, or assignees, or assignees in bankruptcy, is not within the evil at which the statute aimed." Since then it has been held that the statute does not cover assignments made to trustees in bankruptcy or to a receiver appointed by a court.

We submit that the passing of a claim by reason of a merger or consolidation of corporations, made pursuant to statutory enactment, must fall within the rules laid down in these cases. The basis of such rulings is that there is, after

all, but a change of entity. The former owner of the claim has lost his power to prosecute it. He has lost his physical existence, or his legal existence, or his lawful right to prosecute, and that right has vested in another, just as in the case at bar.

3. This case is not at all like that of the *St. Paul & Duluth Railroad Co.* v. *United States*, 112 U. S. 733. There a mortgage was foreclosed, and then followed a judicial sale conveying the mortgaged property to a purchaser. Not only was the proceeding voluntary from the time of the execution of the mortgage to the completion of the judicial sale, but this court expressly said:

> "We do not find in the mortgage, or decree of sale any term of description, as to the property and interests conveyed, sufficient to pass the interests therein of the Railroad Company to the purchaser at the sale. The same remark applies to the contract itself. The appellant, by virtue of the sale of the railroad and property rights mortgaged, did not become assignee of the contract * * * and can can claim nothing as such in this suit. There are no words of description in the mortgage which include it."

The opinion sets forth at length what was sold, and from the statement it clearly appears that no contracts nor choses in action were covered by the sale. For these reasons, that case is in no sense authority here. Moreover it does not appear in that case that there was any merger, absorption or consolidation, by which the petitioner had acquired the rights, properties and franchises of the company which made the contract with the United States.

II.

1. Section 4,002, Rev. Stats,, authorizes the readjustment

of compensation for the transportation of mails "*on railroad routes*" and enacts, in the second part of the section, that the pay per mile per annum shall not exceed certain rates of pay for certain weights of mail, "*on routes carrying their whole length an average weight*" of certain stated amounts, "the average weight to be ascertained, in every case, by the actual weighing of the mails."

This section prescribes certain definite compensations for certain prescribed average weights. The language of the statute makes definite and certain the maximum amounts to be paid when the average weights *on the whole length of the routes* has been ascertained in the manner prescribed by the section. The language is so positive that it does not stand in need of interpretation. Therefore, and for the sake of the argument, we may eliminate the interpretation put on the section by the Department, although the appellant had the right to rely, not only on the plain and obvious meaning of the statute, but also on the interpretation placed on it by the Department, as in the petition alleged.

It is true that the order incorporated in the notice of February 4, 1890 (Rec., pp. 2, 3), stated that it was made with the understanding that the rate of compensation would be adjusted in a subsequent order, in accordance with the law, for that was but a preliminary or temporary order in the nature of things, being one to "extend service."

It is also true that the notice of December 1, 1890 (Rec., pp. 3, 4), stated that the compensation on Route No. 139,016, between Milwaukee and Champion, had been fixed from September 3, 1890, to June 30, 1891, unless otherwise ordered, under the acts of March 3, 1873, July 13, 1873, and June 17, 1878, upon the returns therein described, at the rate of $162.53 per mile for 164.26 miles. That order also allowed *the same rate* from February 24 to September 22, 1800, for the extension between Republic and Champion. The order was so made as to adjust the rate on the extension from the time it was put in operation

up to September 22, 1890, and to fix the rate for *the entire route* between Milwaukee and Champion from September 23, 1890, to June 30, 1891. In that way the order was made harmonious and all-embracing, just as the statute required. The order concluded with the following sentence: "This adjustment is subject to future orders and to fines and deductions."

We are now to consider what "future orders" could be made according to law. The notice itself speaks of the acts governing the subject, but, had it not done so, it is apparent that the law must govern such matters, for subjects of that importance would not be left to the whim or caprice of an official of the Department.

The act of March 3, 1873, spoken of in the order above referred to, is now Section 4,002, Rev. Stat.

The act of July 12, 1876 (19 Stat., 78), authorize a deduction of 10 per cent from the rate fixed by the first section of the act of March 3, 1873. (Sec. 4002, Rev. Stat.)

The act of June 17, 1878 (20 Stat., 140), further authorised a reduction of 5 per cent per annum from and after July 1, 1878.

The Postmaster-General had no other authority to make "future orders" than such as was granted by these acts. *They made the contract between the railroad company and the United States.*

Now compare the notice of December 3 (Rec., p 4), with the notice of December 1, 1890 (Rec. p. 3). The notice of December 3 does not purport to do anything more than fix the compensation between Republic and Champion, from February 24, 1890, to June 30, 1891, under the acts named, at $132.53, *which is exactly the rate named in the order of December 1, for the whole route.* The later order does not purport to deal with *the whole* of Route No. 139,016, from Milwaukee to Champion, described and dealt with in the order of December 1. The order of December 1 *covered the whole of the line and for all of the time involved.*

The later order purports to deal *only* with the extension of 8.89 miles from Republic to Champion. Every essential feature of the order of December 3 was covered by the order of December 1, and the order of December 3 is therefore unlawful, nugatory, or non-effective. To make it effective, it would have to operate as a complete and lawful invalidation of the order of December 1, and that cannot be without holding that it reduces the rate of compensation on that part of the route between Milwaukee and Republic from $132.53 per mile to the previous rate of $76.35 per mile, although it does not contain such language.

We are brought face to face with the proposition that the Postmaster-General had the right to fix the compensation at $132.53 per mile for the whole route of 264.26 miles, and then reduce the rate on all of the route by naming the same rate for 8.89 miles and saying nothing about the larger part of the route. *This would make the lesser include the greater.* The law does not take cognizance of a part of a route. The statutes made a contract for the whole of the route.

2. Counsel for the United States insists that the railroad companies should have protested against the making of the order of December 3, and should have refused to carry the mails, failing in which the company waived its prior rights and acquiesced in the action of the department.

(*a*) We submit, in the first place, that the order of December 3 is ineffective and unlawful, for the reasons above stated, and that the company was under no legal obligation to pay any attention to it.

(*b*) The law made the contract between the company and the Government, just as much as if it had been put in writing, as was done in the case of *The Chicago & Northwestern Railway Co.* v. *United States*, 140 U. S., 680–686, in which it was held that the company did not waive its rights under the contract or acquiesce in the new proposals of the Postmaster-General, by failing to protest, and that it

was not obliged to protest against his erroneous interpretation of the law.

The case of *The Eastern Railroad Co.* v. *United States*, 129 U. S., 391, is not opposed to this view. There the Postmaster-General made a reduction of 5 per cent as he had the right to do. The company carried the mails without protest or objection, and thereby assented to the rate fixed by the reduction. But it must be noted that the action of the Postmaster-General was lawful and effective, for it covered the whole route, which is not true of the order made in this case, if it can be said that one was lawfully made. Mr. Justice Harlan, who wrote the opinion in that case, showed that the Postmaster-General, by the use of the words "unless otherwise ordered," reserved the power "to exercise the authority conferred, and to conform to the direction given, by the act of 1878," which act (20 Stat., 140), authorized him to reduce the rate of compensation 5 per cent per annum from and after July 1, 1878. The court was dealing with a valid exercise of power with reference to the whole route, because it was made within the terms of the statute. Here, the court is dealing with an unwarranted and invalid exercise of power, because it relates only to part of the route.

Counsel for the Government places great reliance on *Evansville & Indianapolis Railroad Co.* v. *United States*, 32 C. Cls., 555. There the Department fixed the rate of pay from Evansville to Washington, Indiana, at $42.75 per mile. Subsequently the service was extended from Washington to Worthington. Thereafter the rate was fixed between Washington and Worthington, a part of the route, forty miles in length, at the rate of $55.43 per mile between those two points only, not between Evansville and Worthington, the whole route. The mail was carried over the entire route from Evansville to Worthington without protest or objection, and without a further adjustment of pay. The company received the pay at the

several rates between Evansville and Washington and between Washington and Worthington. An action was brought in the Court of Claims for the difference between $42.75 and $56.43, although there had never been an order adjusting the compensation at the latter figure *over the whole line.*

It is apparent that the case at bar is unlike that case in two essential features: First, here was an order fixing the rate *over the whole line*, and which was never changed or attempted to be changed between Milwaukee and Republic: Second, in the Indiana case there were two separate and distinct orders—one for the line between Evansville and Washington, and the other for the line between Washington and Worthington. Therefore, there were two contracts in that case between the company and the United States, and the Government did not attempt to diminish the amount of compensation fixed by either of the contracts. Therefore, it is plain that the company performed its two contracts, took its pay thereunder, without protest or objection, and the Court of Claims was right in holding that it could not recover. The differences between that case and the one at bar are so marked that the opinion of the Court of Claims cannot have any bearing on this case.

Respectfully submitted,

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Attorneys for Appellant.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE CHICAGO, MILWAUKEE AND ST. PAUL Railway Company, appellant, *v.* THE UNITED STATES. } No. 198.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

On July 19, 1900, the appellant, a railway corporation organized and existing under the laws of the State of Wisconsin, filed its amended petition in the Court of Claims, alleging that there is due the petitioner from the United States the sum of $9,101.08, unpaid remainder for services performed in carrying the United States mails over postal route No. 139016. The averments in the petition may be summarized as follows:

That the Milwaukee and Northern Railroad Company on and prior to the 4th day of February, 1890, owned and operated the line of railroad from Milwaukee, Wis., to Republic, in the State of Michigan, a distance of 255.37 miles.

That on said 4th day of February, 1890, said line of road was extended and put in operation from Republic to Champion, Mich., a distance of 8.89 miles, making a total mileage of 264.26 miles.

That said line of railroad so owned by the Milwaukee and Northern Railroad Company had, prior to said 4th day of February, 1890, been designated by the postal authorities of the United States as route No. 139016, and had been authorized by the Post-Office Department to carry United States mail thereon, at such compensation as was or might be authorized by law and the practice of the Post-Office Department.

That on said 4th day of February, 1890, the Postmaster-General established and extended the railway mail service over that portion of the extended road from Republic to Champion, Mich., a distance of 8.89 miles.

That subsequently the postal authorities caused the United States mails on said route from Milwaukee to Champion to be weighed, as required by law, for thirty successive working days, giving the following notice thereof:

> The general superintendent railway mail service has been directed to weigh the mails on your road, route No. 139016, between Milwaukee and Champion, Mich., for thirty successive days, commencing September 23, 1890, for the purpose of obtaining *data* upon which to adjust the pay in accordance with the acts of Congress governing the same, from February 24, 1890, on extension from Republic to Champion.

and thereupon ordered that the compensation for the transportation of mails on said route be fixed from September 23, 1890, to June 30, 1891, at the rate of $35,022.37 per annum, the same being $132.53 per mile for 264.26 miles; and that from February 24 to September 22, 1890, compensation should be allowed at the rate of $1,178.19 per annum, being $132.53 per mile for the 8.89 miles' extension from Republic to Champion, Mich. (Record, pp. 2–4), the order fixing said compensation being of date December 1, 1890. (Record, p. 3.)

That on December 3, 1890, the Postmaster-General further adjusted the compensation for carrying said mails, as shown by the order of December 3, 1890, which provided that the compensation should be $1,178.19 per annum, the same being $132.53 per mile for the 8.89 miles' extension. (Record, p. 4.)

That in pursuance of the order of December 1, 1890, the Milwaukee and Northern Company entered upon the work of carrying the mails on said route between Milwaukee and Champion, and performed the services required by the order of December 1, 1890.

That the United States, instead of paying said railroad company the full amount of money to which it was entitled for the services rendered as aforesaid, only paid it at the rate of compensation fixed by said order, to wit, $132.53 per mile for 8.89 miles, being the extension from Republic to Champion only, and refused to pay it any sum beyond the sum of

$86.35 per mile for the mileage between Milwauke and Republic, leaving a balance due and unpaid $9,101.08.

That after said services had been performed and th full amount earned as fixed by the order of Decembe 1, 1890, payment of said amount of $9,101.08 wa refused, and the Milwaukee and Northern Railroa Company presented a claim to the Post-Office Depar ment for the payment of the same, which claim wa rejected for reasons set forth in paragraph 5 of th petition, the Post-Office Department contending tha the order of December 3, 1890, was a correction of th order of December 1, 1890, which said last-mentione order fixed the rate for the entire distance betwee Milwaukee and Champion at $132.53 per mile. (Re ord, p. 6.)

The petition further alleges—

> That on the 30th day of September, 1890, became the purchaser, and thereupon it becam the lawful owner by assignment and transfe of all of the capital stock of the said Milwauke and Northern Railroad Company; that on th 1st day of October, 1890, the board of direc ors of the Milwaukee and Northern Railroa Company was reorganized by the election persons who were either directors or officers the petitioner, and the offices were filled by th election of persons who were officers of its com pany, with the solitary exception of the presider of the Milwaukee and Northern Railroad Com pany; that from the 30th day of Septembe 1890, until the 26th day of June, 1893, tha

company operated the railroad as a separate organization and in the name of the Milwaukee and Northern Railroad Company; that on the 26th day of June, 1893, pursuant to a vote of the stockholders of the Milwaukee and Northern Railroad Company, the latter company executed a deed to the petitioner, whereby it conveyed to petitioner all its railroads, railways, rights of way, depot grants, tracks, bridges, etc., and also all other property and choses in action whatsoever, both real and personal, of the said Milwaukee and Northern Railroad Company, and all its rights, privileges, and corporate franchises connected with or relating to such railroad or to the construction, maintenance, use, or operation of the same. And that thereafter, to wit, August 28, 1893, the Milwaukee and Northern Railroad Company held its last stockholders' meeting and its last directors' meeting, and since that time it has not exercised any corporate functions or powers, nor has it pretended to do anything of the sort. Your petitioner avers that by reason of the premises it has been the owner of the claim in suit ever since June 26, 1893, and is now the owner of the foregoing claim, no part thereof having been assigned or transferred by the petitioner in any way, and that it is entitled to receive payment thereof.

To the amended petition so filed the United States interposed its demurrer upon two grounds:

First. Because it appears that the claim therein presented has come to the claimant, if at all, by pretended assignment, which as to the United States is void.

Second. Because the allegations set forth in said amended petition do not state facts sufficient to constitute a cause of action in favor of the claimant and against the United States.

The demurrer was sustained by the Court of Claims and it was ordered that the amended petition be dismissed. From this judgment of dismissal the railway company appeals to this court.

ARGUMENT.

THE ASSIGNMENT OF THE CLAIM.

The first ground of the demurrer in this action is that the assignment to the claimant by which it asserts ownership of the claim, which is the basis of this action, is void under section 3477 of the Revised Statutes of the United States, which reads as follows:

> SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof * * *

As alleged in claimant's petition, and as stated in the brief for the appellant, the claimant became the

owner of the claim of the Milwaukee and Northern Railroad Company against the United States for carrying Government mails, through a deed from the former to the claimant by which that corporation conveyed to the claimant all its property of every kind, both real and personal, including this claim. This was a purely voluntary transaction, having reference only to the interests of the parties concerned, and hence the claim in question passed to the claimant by voluntary assignment. There seems to be no escape, therefore, from the conclusion that such assignment is controlled by the statute above cited, and hence is void.

This court has, on different occasions, passed upon that statute, and has done so in unmistakable terms and without any hesitation as to its meaning.

In the case of *Spofford* v. *Kirk* (97 U. S., 488), Mr. Justice Strong, speaking for the court, said:

> The act of Congress approved February 26, 1853 (10 Stat., 170), entitled "An act to prevent frauds upon the Treasury of the United States," reenacted in section 3477 of the Revised Statutes, declares that all transfers and assignments thereafter made of any claim upon the United States, or any part or share thereof or interest therein, whether absolute or conditional, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless the same shall be freely made and executed in the presence of at least two attesting witnesses after the

> allowance of such claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the Government from creating an interest in the claim in any other than himself.

In the case of *St. Paul and Duluth Railroad Company* v. *The United States* (112 U. S., 733), the Lake Superior and Mississippi Railroad Company entered into a contract to carry the mails at an agreed compensation, which was subsequently reduced at various times by the Postmaster-General. The Lake Superior road mortgaged all its property to trustees to secure its bonds, and the mortgage conveyed all property belonging to the company, which is particularly specified on page 735 of the report cited. The St. Paul and Duluth Company, on the foreclosure of the mortgage, became the purchaser of all the mortgaged property under the judicial sale, by virtue of a decree of court foreclosing the mortgage. The reduction of the Postmaster-General amounted to over $12,000, something over $3,000 of which had been earned by the contractor, the Lake Superior and Mississippi Railroad Company, and the remainder by the appellant. The St. Paul and Duluth Company brought suit for the total amount

of the reduction. The mortgage included all franchises connected with the mortgagor's railway, all corporate franchises of any nature, all endowments, income, advantages, etc. It was held that under the purchase of the property in the mortgage at judicial sale by the St. Paul Company it did not become the assignee of the contract between the United States and the Lake Superior Company, and that it could therefore claim nothing as such in the suit. It was further held: "That part of its claim for services rendered prior to the sale by the Lake Superior and Mississippi River Railroad Company falls within the prohibition of Revised Statutes, 3477."

If by reason of this prohibition of section 3477 all the property of the Lake Superior Company mortgaged by it and bought at judicial sale by the St. Paul Company did not include the claim for carrying the mails, how can it be contended in the case at bar that by virtue of the purchase by appellant of all the property of the Milwaukee and Northern Railroad Company it thereby became the owner of the claim sued upon? In the case cited it was held:

> It is a voluntary transfer, by way of mortgage, for the security of a debt, and finally completed and made absolute by a judicial sale.
>
> If the statute does not apply to such cases, it would be difficult to draw a line of exclusion which leaves any place for the operation of the prohibition.
>
> So the transfer, by the same proceeding, of the contract itself, so as to entitle the assignee to per-

form the service and claim the compensation stipulated for, is forbidden by section 3737, Revised Statutes, which provides that "no contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned."

The explicit provisions of this statute do not require any comment. No explanation could make it plainer.

(See case cited, pages 736–737.)

In commenting upon the foregoing case in *Price* v. *Forrest* (173 U. S., 422), Mr. Justice Harlan, speaking for the court, said:

> Nothing more was adjudged in that case (*St. Paul and Duluth Railroad Company* v. *United States*, 112 U. S., 733) than that a voluntary transfer by way of mortgage of a claim against the United States for the security of a debt, and finally completed and made absolute by a judicial sale, was within the purview of the prohibition contained in section 3477 and could not be made the basis of an action against the Government in the Court of Claims. Such a voluntary assignment to secure a specific debt was held to be within the mischiefs which that section was intended to remedy. To the same class belongs *Ball* v. *Halsell* (161 U. S., 72), which was the case of a voluntary transfer of part of a claim against the United States on account of the depredations of certain Indians on the property of the claimant.

The only exception which this court has made from the operation of the statute is in cases where the assignment is "by operation of law."—Assignments defined in *The United States* v. *Gillis* (95 U. S., p. 416), as "devolutions of title by force of law, without any act of parties, or involuntary assignments, compelled by law." The instances of assignment by operation of law, which this court has held not to be within the statute, are cases where the assignment has been made in bankruptcy or insolvency, or to a receiver appointed by the court. (*Irwin* v. *United States*, 97 U. S., 392; *Butler* v. *Goreley*, 146 U. S., 303; *Price* v. *Forrest*, 173 U. S., 410.) In every such case the assignment was involuntary. The only instance in which there has been any voluntary act on the part of the assignor, in which the court has held the assignment to be valid, is that of a voluntary assignment for the benefit of creditors. As to such an assignment it was pointed out that there was no difference between it and an assignment in bankruptcy, in the following language:

> In what respect does the voluntary assignment for the benefit of his creditors, which is made by an insolvent debtor of all his effects, which must, if it be honest, include a claim against the Government, differ from the assignment which is made in bankruptcy? (*Goodman* v. *Niblack*, 102 U. S., 560.)

It seems too clear for argument that the assignment of the claim which is the subject of this action does not, in any sense, come within the exceptions above

enumerated which are the only exceptions that have been announced by this court.

It seems equally clear also that there is a radical and essential difference between such excepted assignments and the assignment of the claim of the appellant. In every case where the assignment comes within the class defined by this court to be by operation of law, the transfer of the claim is and must be made in absolute conformity with the law governing the transaction, and the claim passes into the possession and ownership of an officer of the court—a trustee in bankruptcy, an assignee in insolvency, or a receiver of the court, and thereafter is subject to the control of the court with a status clearly defined by the statute under which the transfer is made. And this is equally true even where the transfer is initiated upon the involuntary petition of the assignor. But in the present case the assignment was as voluntary in every respect as the sale and transfer in any other case of a purchase and sale of property between private parties. Nor is this voluntary character of the assignment modified in the slightest degree by the fact that, as asserted by the appellent, it was made pursuant to a statute of Wisconsin authorizing the claimant, as a railroad corporation, to acquire by purchase all of the property of another railroad corporation. The only relation that such a statute bears to the transaction is that it renders it legal, but it gives it no other sanction, and certainly can not operate to relieve the claimant in any degree from the operation of a Federal statute relating to

assignments of claims against the United States. In other words, a statute which made it legal for the claimant to purchase all the property of another corporation and take a conveyance thereof, can not possibly have the effect to legalize an assignment or transfer by such conveyance of a claim against the United States in derogation of a statute of the United States which says that such an assignment is void.

The question may be summed up as follows:

By the decisions of this court only assignments "by operation of law" are excepted from the prohibition of section 3477. By the same decisions an essential element of an assignment by operation of law is that it must be involuntary, being in effect by compulsion of law. The assignment relied on by the appellant is in no sense involuntary, and it therefore falls within the prohibition of the statute.

THE MERITS.

THE AMENDED PETITION DOES NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

As shown by the statement, the order of December 1 fixed the compensation for carrying the mails for the whole distance between Milwaukee, Wis., and Champion, Mich., including the extended portion of the road. If this order were to stand, it would revoke and render null and void the compensation allowed by a previous order for carrying the mails between Milwaukee and Republic; but the postal authorities immediately discovered the mistake in the order of December 1, by which order they undoubtedly

intended to fix the compensation from Republic to Champion only. This conclusively appears in the order for the weighing of the mails, recited in the petition, wherein it is expressly stated that—

> The General Superintendent Railway Mail Service has been directed to weigh the mails on your road, route No. 139016, between Milwaukee and Champion, Michigan, for thirty successive days, commencing September 23d, 1890, for the purpose of obtaining *data* upon which to adjust the pay in accordance with the acts of Congress governing the same, from February 24, 1890, *on extension from Republic to Champion.* (Record, p. 5.)

Upon this discovery, two days after the order of December 1, they issued the order of December 3 (Record, p. 4), which fixed the compensation for the transportation of the mails on the extension of the route between Republic and Champion. The order of December 1, as well as that of December 3, provided for *future orders.* Furthermore, it is shown by paragraph 5 of the petition (Record, p. 6) that the Department claimed that the order of December 3 was a correction of the order of December 1. The order of December 3 was directed to the general superintendent of the Milwaukee and Northern Railroad Company at Milwaukee. It is not stated anywhere in the petition, and there is nothing in the record of this case to show that the Milwaukee and Northern Railroad Company or appellant in any way or manner objected to the change made by the order of December 3, or that they inter-

posed any objection or protest to carrying the mails under the rates as fixed by said order, but on the other hand, the Milwaukee and Northern Company continued to perform the services and carried the mails, without protest, without calling the attention of the Department to the change in the order of December 1 and without in any manner or in any way giving intimation that the company was not satisfied with the rates as fixed under the order of December 3. Inasmuch as it is clearly shown by the petition that the order of December 1, 1890, was a mistake and that the same was corrected by the order of December 3, 1890, two days thereafter, the original order, whatever it may have been, for carrying the mails between Milwaukee and Republic was left just as it had been before the issuance of the order of December 1 and the order of December 3 had the effect, further, of annulling the order of December 1, and of establishing the rate for the transportation of the mails over the extended portion of the route only, to wit, from Republic to Champion.

But the appellant contends that as the mails had been weighed for the entire route after the postal service had been extended on the new portion of said route, the weighing was for the purpose of fixing the rate of compensation for the entire route and not on the extension only; the allegation in the petition being as follows:

> * * * under the uniform practice and usage of the Post-Office Department for many

> years, whenever postal service is established on an extension of a line of railroad, and a weighing of the mail is had on the entire route for the purpose of ascertaining the rate of compensation, such compensation is fixed for the entire route and not on the extension only. (Record, p. 7.)

This contention is not tenable. In the case of the *Evansville and Indianapolis Railroad Company v. The United States* (32 C. Cls. R., 555) this question was carefully considered by the court and decided adversely to claimant's contention.

In that case the claimant owned and operated a line of railway between Evansville and Washington, Ind., a distance of 57.71 miles, which had been designated by the postal authorities as postal route No. 22026, and over which the claimant contracted to carry the United States mails at $42.75 per mile per annum from July 1, 1884, to June 30, 1887. The order provided, just as the order does in the case at bar, that the compensation was fixed "subject to future orders and to fines and deductions." Subsequently the route was extended to Worthington, a distance of 40.62 miles, over which the railway service was extended on July 20, 1886, to take effect on August 2, 1886, the rate of compensation to be thereafter adjusted. The mails were weighed over the route between Evansville and Worthington, as required by law, and in accordance therewith the rate of compensation was fixed over the extended portion of said route from Washington to Worthington at $56.43 per mile "subject to future orders and to fines and de-

ductions." The rate of compensation theretofore fixed for transporting the mails from Evansville to Washington remained unadjusted and unchanged, although the daily average rate of mail matter transported thereon was the same as that transported over the extended portion. The company was notified of the adjustment so made over the extended portion of the route and it continued thereafter to transport the mails, as in this case, without protest or objection. The claimant contended on presentation of its claim for carrying the mails over the entire route, that it was entitled to $56.43 per mile between Evansville and Washington, the same as between Washington and Worthington, or in other words, that the order fixing the compensation at $56.43 between Washington and Worthington had the effect, in view of the mails being weighed under authority of law over the entire route, of fixing the compensation over the entire route at said rate of $56.43. This is practically the contention of claimant in the case at bar, but in the case cited, the court held that the fixing of the rate over the extended portion in no way affected the rate over the old portion, and this notwithstanding that the mails over the entire route had been weighed for thirty successive days as required by law and as was done in the case at bar; that the extension of the railway and mail service over the extended portion of the route in no way interfered with the contract previously entered into between the Post-Office Department and the company for carrying the mails between Evansville

and Washington. And so in this case, whatever rates and contract existed for carrying the mails between Milwaukee, Wis., and Republic, Mich., over route No. 139016 were not affected by the order of December 3, 1890, fixing the rates for carrying the mails over the extended portion of the route between Republic and Champion. The only order, then, that could possibly affect the existing contract for carrying the mails between Milwaukee, Wis., and Republic, Mich., was the order of December 1, 1890, and this, as has been shown, was an error, and immediately corrected by the order of December 3. In this connection we cite the case of the *Eastern Railroad Company* v. *The United States* (129 U. S., 391), where the company entered into a contract with the Postmaster-General to carry the mails at a certain rate "unless otherwise ordered." The Government subsequently made a reduction of 5 per cent, but the company continued to carry the mails after such reduction, without protest and without objection. In the opinion Mr. Justice Harlan said:

> It can not be said that the reduction of 5 per cent was a violation of that contract, for, according to its terms, the parties agreed that the rates fixed at the latter date were subject to such orders as the Postmaster-General might make. We do not mean that the railroad company was bound to continue the carrying of the mails if subsequent changes in the rates were unreasonable or did not meet with its assent. On the contrary, it was at liberty, when the 5 per cent reduction was made, to discontinue their transportation on its cars. (See case cited, p. 395.)

When the Milwaukee and Northern Railroad Company received notice of the order of December 3, 1890, it had notice of the adjustment of the compensation over the extension of the route, and that adjustment left the original contract in full force for carrying the mails between Milwaukee and Republic and related only to the compensation for the service between Republic and Champion. The company made no protest, in no way sought an explanation of the order of December 3, and it may be justly inferred that it viewed the order of December 3 in the same light and as having the same force and effect as intended by the postal authorities.

It must be remembered that there was no duty resting upon the Post-Office Department to readjust the compensation for carrying the mails between Milwaukee and Republic, which, nevertheless, it was imperative to fix the compensation for the service between Republic and Champion; and since the extension from Republic to Champion was not constituted a new route, and was therefore added, as was manifestly necessary, to the old route between Milwaukee and Republic (No. 139016), the compensation for carrying the mail on this extension could be determined under the regulations only by weighing the mail over the whole route as thus extended. This weighing was accordingly done by the Post-Office Department, but with the sole purpose, as expressly announced in the order for such weighing, of determining the compensation to be paid the Milwaukee and Northern Railroad

Company for carrying the mail over the extension of the old route from Republic to Champion.

Appellant sets forth in its petition a list of some twenty-five different routes that had been extended and on which the postal authorities ordered the weighing of the mails over the entire route after the extended portion had been put in operation and on which routes the Government after the weighing of said mails as required by law adjusted the compensation for carrying the mails over the entire route, including the extended portion. (Record, p. 7.) While it may be true that the postal authorities elected to adjust the compensation over the entire routes mentioned, including the extensions in the particular cases set forth in the petition, yet this fact in nowise affects the right of the Post-Office Department to adjust the compensation over the extended portion of the route only, leaving the contract over the old portion of the route as it was prior to the extension. This, as we have pointed out, it had a right to do in the case of the Evansville and Indianapolis Railroad Company. Furthermore it may have been that in the routes designated in appellant's petition the contracts for carrying the mails over the old portion of the routes was about to expire and the Government found it expedient to adjust the compensation over the entire routes, including the extensions. Whatever may have been the practice of the Department in this respect, it certainly was not bound to annul a contract that it had for carrying the mail over a route where that contract

was advantageous to the Government and had not terminated, simply because the railroad company made an extension of its road and the Department extended the mail service over such new portion.

For the reasons above given, it is insisted that on the merits the petition of claimant was rightfully dismissed.

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O

Supreme Court of the United States.

No. 198.—October Term, 1904.

The Chicago, Milwaukee and St. Paul Railway Company, Appellant, *vs.* The United States. } Appeal from the Court of Claims.

[May 15, 1905.]

Mr. Justice McKenna delivered the opinion of the Court.

The appellant, a Wisconsin corporation, filed a petition in the Court of Claims, August 25, 1896, which it amended July 19, 1900, and by which it sought recovery from the United States of the sum of $9,101.08, for compensation for carrying the mails from Milwaukee, Wisconsin, to Republic, Michigan, and thence to Champion, Michigan.

The services were rendered by the Milwaukee and Northern Railroad Company. Appellant's ownership was derived from that company, as alleged in the petition, as follows:

"Your petitioner further avers that on the 30th day of September, 1890 it became the purchaser, and thereupon it became the lawful owner, by assignment and transfer, of all of the capital stock of the said Milwaukee and Northern Railroad Company; that on the 1st day of October, 1890, the board of directors of the Milwaukee and Northern Railroad Company was reorganized by the election of persons who were either directors or officers of the petitioner, and the offices were filled by the election of persons who were officers of its company, with the solitary exception of the president of the Milwaukee and Northern Railroad Company; that from the 30th day of September, 1890, until the 26th day of June, 1893, that company operated the railroad as a separate organization and in the name of the Milwaukee and Northern Railroad Company; that on the 26th day of June, 1893, pursuant to a vote of the stockholders of the Milwaukee and Northern Railroad Company, the latter company executed a deed to the petitioner, whereby it conveyed to petitioner all its railroads, railways, rights of way, depot grants, tracks, bridges, etc., and also all other property and choses in action whatsoever, both real and personal, of the said Milwaukee and Northern Railroad Company, and all its rights, privileges and corporate franchises connected with or relating to such railroad, or to the construction, maintenance, use or operation of the same. And that thereafter, to wit, August 28, 1893, the Milwaukee and Northern Railroad Company held its last stockholders' meeting and its last directors' meeting, and since that time it has not exercised any corporate functions or powers, nor has it pretended to do anything of the sort."

The United States demurred to the petition on the grounds that (1) "The claim came to the claimant, if at all, by a pretended assignment which as to the United States was void; (2) the allegations of the amended petition did not state facts sufficient to constitute a claim against the United States." The demurrer was sustained and the petition dismissed, whereupon this appeal was taken.

The demurrer presented the questions of the validity of the assignment and the merits of the claim. We rest our decision on the latter. We express no opinion of the validity of the assignment.

The Milwaukee and Northern Railroad ran from Milwaukee, Wisconsin, to Republic, Michigan, a distance of 255.37 miles. Under the authority given him by law, "to arrange the railway routes on which mail is carried," (section 3997 of the Revised Statutes of the United States,) the Postmaster General designated the road from Milwaukee to Republic as Postal Route No. 139,016, and compensation was fixed for carrying the mails thereon. On February 4, 1890, the road was extended to Champion, Michigan, a distance of 8.89 miles. Provision was made for the extension by an order dated February 4, 1890, which directed that service should be extended from Republic to Champion, increasing distance 9.16 miles, less .27 miles, making a net increase of 8.89 miles, "in accordance with distance circular, and with the understanding that the rate of compensation on this extension will be adjusted in a subsequent order in accordance with law."

On December 1, 1890, the following order was made and directed to the general manager of the railroad:

"SIR: The compensation for the transportation of mails, etc., on route No. 139,016, between Milwaukee, Wis., and Champion, Mich., has been fixed from Sept. 23, 1890, to June 30, 1891, (unless otherwise ordered) under acts of March 3, 1873, July 12, 1876, and June 17, 1878, upon returns showing the amount and character of the service for thirty successive working days, commencing Sept. 23, 1890, at the rate of $35,022.37 per annum, being $132.53 per mile for 264.26 miles.

"From February 24 to Sept. 22, 1890, pay is allowed at the rate of $1,178.19 per annum, being $132.53 per mile for 8.89 miles extension between Republic and Champion, Mich.

"This adjustment is subject to future orders and to fines and deductions."

It will be observed that this order purports to fix the compensation on route 139,016 between Milwaukee and Champion.

The dates designated are somewhat confusing. However, in two days another order was issued and directed to the company, which reads as follows:

"SIR: The compensation for the transportation of mails, etc., on route No. 139,016, between Republic and Champion, Mich., has been fixed from

February 24, 1890, to June 30th, 1891, (unless otherwise ordered) under acts of March 3, 1873, July 12, 1876, and June 17, 1878, upon returns showing the amount and character of the service for thirty successive working days, commencing Sept. 23, 1890, at the rate of $1,178.19 per annum, being $132.53 per mile for 8.89 miles extension.

"This adjustment is subject to future orders and to fines and deductions."

The first order revoked the compensation for carrying the mails from Milwaukee to Republic, which had been fixed, and was manifestly a mistake. The second order was intended to correct the mistake and confine the adjustment to the extension from Republic to Champion.

The contention of appellant is that the Postmaster General had no power to issue the second order, but was required by section 4002 of the Revised Statutes of the United States to fix compensation for the whole route as extended. The appellant urges in support of the contention not only the provision of the section, but the practice and usage of the Post Office Department. Section 4002 is as follows:

"The Postmaster General is authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned:

"First. That the mails shall be conveyed with due frequency and speed; and that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails.

"Second. That the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars; and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

The section does not sustain the appellant's contention. The Postmaster General is given the power to arrange the railway routes upon which the mail is to be carried, and to adjust and readjust compensation. The orders of December 1 and December 3, respectively, reserved this power, and the only limitations on its exercise, expressed in section 4002, is as to the manner of ascertaining the rate, which is to be by the average weight of the mails. There is nothing in the section which requires the abrogation of prior contracts when an extension is made beyond the terminal of an established route or precludes provision for the extension alone. A con-

tract may not be forced upon a railway. It may accept, however, and become bound by the action of the Post Office Department. (*Eastern Railroad* v. *United States*, 129 U. S. 129.) The record does not show any protest against the order of December 3. Its terms were unmistakable, and, as counsel for the Government observes, "it may be justly inferred" that the railroad company "viewed the order of December 3 in the same light and as having the same force and effect as intended by the postal authorities."

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.